OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

April 11, 2007

Ms. Nicole Longwell
The McDaniel Lawfirm
320 S. Boston Avenue, Suite 700
Tulsa, Oklahoma 74103

(Via Email and U.S. Mail)

Re: The State of Oklahoma's Agency Privilege Logs for State of Oklahoma v. Tyson et. al, Case No. 05-CV-329-GKF-SAJ

Dear Ms. Longwell:

I am writing in response to your letter dated March 19, 2007, and our conference call on Friday, April 6, 2007. In our conference call, the State committed to review the state agencies' privilege logs and to revise them as appropriate by May 4, 2007. Specifically, the State agreed to: (1) Provide additional detail pertaining to the identification of authors and recipients listed on the Agency privilege logs; (2) Provide additional detail pertaining to the general description of the documents listed on the agency privilege logs; and (3) Review the State's 26(b)(4) designations. Additionally, as agreed, I am providing the following response to the authority you provided regarding work product protection for prior litigation and attorney client privilege issues.

WORK PRODUCT PROTECTION

In your March 19, 2007 letter, you stated that documents prepared by the State during its normal course of business or pursuant to regulatory requirements are not considered prepared in anticipation of litigation. In support of your position you cite to Martin v. Bally's, 983 F.2d 1252, 1263 (3rd. Cir. 1993). The Court's holding in that case does not support your position. The Court held that'[i]n sum, an employer cannot claim work product to avoid sharing routine exposure records with OSHA, ***but only those records prepared in anticipation of litigation***." (emphasis added). Thus, the decision stands merely for the proposition that records prepared in anticipation of litigation are protected by the work product protection. It does not hold that all state agency documents prepared in the course of exercising regulatory authority are outside the scope of the protection.

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WORK PRODUCT PROTECTION UNDER THE OPEN RECORDS ACT

You cite to the Oklahoma Open Records Act (the "Act"), 51 O.S. 24.A.1 et. seq., as authority for your assertion that work product protection does not apply to State agency documents. The Act, ". . . does not apply to records specifically required by law to be kept confidential including: a. records protected by a state evidentiary privilege ***such as the attorney-client privilege, the work product immunity from discovery and the identify of informer privileges.***" 51 O.S. § 24A.5(1)(a), (emphasis added). Thus, it is clear that state evidentiary privileges and protections remain unaffected by the Act and continue to apply to the documents generated by public bodies.

In addition to these privileges, the Act also provides that, "[e]xcept as otherwise provided by state or local law, the Attorney General of the State of Oklahoma and ***agency attorneys*** authorized by law. . . may keep its litigation files and investigatory reports confidential. 51 O.S. § 24A.12, (emphasis added). It is clear that agency attorneys, whether working with the Attorney General's office or not, may keep their litigation files and investigatory reports confidential under the Act. Further, there is nothing in the Act or case law which suggests that a document would lose its privilege if the Attorney General's office shares that document with a client agency in the course of preparing for litigation or conducting an investigation. Such a rule would produce an absurd result and would hamstring the State in its investigation of wrongdoing.

I believe you also cited 51 O.S. § 24A.20 as standing for the proposition that just because an agency has possession of documents that it is using for investigatory purposes does not take it out of the strictures of the Act. A plain reading of section 24A.20, makes it clear that it is only documents that "...would otherwise be available for public inspection and copying" which cannot be kept confidential as part of a litigation or investigatory file or through possession for investigatory purposes. See 51 O.S. § 24A.20. Indeed, one of the tests we have used in determining whether a document is work product protected is whether or not that document could be produced in an open records request. We will review our designations to ensure that any document that is available under the Act is not claimed as work product.

Additionally, I reviewed the Attorney General Opinion, 1999 OK AG 58 and Saxon v. Macy, 795 P.2d 101 which you made reference to on our conference call. Attorney General Opinion 99-58 dealt with the pleadings in a district attorney's litigation file and whether or not those could be kept confidential. The Opinion clearly states "[t]herefore, from these statutes we conclude that criminal pleadings in the litigation files of a district attorney may be kept confidential. Once such records are filed with a court clerk, where no privilege of confidentiality exists, such records must ordinarily be made available for public inspection and copying at the office of the court clerk." Opinion at Para.9, internal citations omitted. All this Opinion stands for, therefore, is that a district attorney may keep its pleadings confidential unless and until they are filed, at which time they then become a public record subject to copying and inspection at the Court Clerk's office, not the district attorneys. A review of Saxon v. Macy fails to show any relevance to the issues presented as the only analysis undertaken by the Oklahoma Supreme Court in Saxon related to the Court's ultimate holding that the appeal was moot because the defendant no longer had possession of the records sought by the plaintiff. Id. at 102.

WORK PRODUCT PROTECTION FROM PRIOR LITIGATION

I must also respectfully disagree with your assertion that work product protection for documents in prior and pending litigation/investigations are not protected in the current litigation. I refer you to Frontier Refining Inc. v. Gorman-Rupp Company, 136 F.3d 695 (10th Cir. 1998). In Frontier, the Tenth Circuit expressly held that work product protection survives to other litigation. The lower court in Frontier had ruled that work product protection for documents prepared in the underlying litigation, not in anticipation of the current litigation had lost their work product protection. Id. at 702. The Tenth Circuit reversed and noted:

> [t]he Supreme Court has recognized in dicta that 'the literal language of [Rule 26 (b)(3)] protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation.' FTC v. Grolier Inc., 462 U.S. 19, 25, 103 S.Ct. 2209, 2213, 76 L.Ed 2d 387 (1983). According to the Supreme Court's dicta, Rule 26's language does not indicate that the work product protection is confined to materials specifically prepared for the litigation in which it is sought. Work product remains protected even after the termination of the litigation for which it was prepared. *See id.* The language from Grolier set out above, although dicta, provides a particularly strong indication that Rule 26(b)(3) applies to subsequent litigation."
> Frontier at 703.

The Tenth Circuit also noted that "[i]n addition to the compelling Supreme Court dicta, it appears every circuit to address the issues has concluded that, at least to some degree, the work product doctrine does extend to subsequent litigation." *Id.* The Court concluded that ". . . the work product doctrine extends to subsequent litigation." *Id.*

ATTORNEY CLIENT PRIVILEGE

The Attorney General provides legal representation for the State and its agencies. State agencies may also be represented by attorneys employed by that agency. The scope of the attorney client privilege for communications between a public officer or agency and its attorney under state law is defined at 12 O.S. §2502. The State is also claiming attorney client privilege pursuant to federal law. "A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981)(citation and quotations omitted). We will review our designations of attorney client privilege and revise them as we deem appropriate.

The State will revise its privilege logs as previously discussed, providing, where appropriate, additional detail pertaining to author and recipient, and to improve the general description of documents. The State will also review its Rule 26(b)(4) and (b)(3) designations. The State will further review its privilege logs to ensure that no document that is available under the Act is claimed as privileged or protected. However, the State will maintain, where appropriate, its work product claims for documents prepared in anticipation of other litigation/investigations. The State will not indicate on the privilege log whether or not the

document was prepared in anticipation of prior litigation as there does not appear to be any authority that requires such a designation. I look forward to your response and to discussing these issues further with you.

Sincerely,

J. Trevor Hammons

J. Trevor Hammons
Assistant Attorney General